IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-425

P. C. PFEIFFER CO., INC. AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners

v.

DIVERSON FORD AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

AYERS STEAMSHIP COMPANY AND
TEXAS EMPLOYERS' INSURANCE ASSOCIATION
Petitioners

v.

WILL BRYANT AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 42(3) of the Supreme Court Rules, the National Association of Stevedores respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the petitioner. Counsel for the petitioners and the Federal Respondent have consented to the filing of this brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005(b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 61 private marine terminal and stevedore employers doing business in ports on the nation's four seacoasts and the state of Hawaii. Based upon U.S. government manhour statistics for calendar year 1974 it is conservatively estimated that NAS member companies are responsible for over 70 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor, some of whom may be entitled to federal Longshoremen's and Harbor Workers' Compensation Act, (the "LHWCA"), 33 USC § 901 *et seq.* and some of whom may be subject to state workers' compensation laws. The NAS member companies are directly responsible for workers' compensation payments under both federal and state law either as self-insureds or through insurance carriers licensed by the U.S. Department of Labor or state insurance commissions.

Thus, the interest of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured worker.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and the amount of such benefits, has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Courts of Appeals and in this court in *Northeast Marine Terminal Corp.* v. *Caputo et al.*, 432 U.S. 249 (1977), and *Edmonds* v. *Compagnie Generale Teansatlantique*, No. 78-479.

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured

longshoremen such as the petitioners in these cases. *Amicus curiae* does not believe that the parties have considered the issue before this Court in precisely the same manner.

Amicus curiae therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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THE STATUTE INVOLVED

These cases involve the proper construction of sections 2(3), 2(4) and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC § 902(3), 902(4) and 903(a) as amended by sections 2(a), (b) and (c) of Public Law 92-576, 86 Stat. 1251. Those sections, with the amendatory language in italics, now provide:

> SEC. 2. (3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term* does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> SEC. 2. (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).
>
> SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). No compensation shall be payable in respect of the disability or death of—
>
> (1) A master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

THE QUESTION PRESENTED

Does the term "maritime employment" as used in section 2(3) of the LHWCA include employments which neither require nor permit a worker to work upon the navigable waters, a vessel on such waters, or in any other indisputably longshoring activity during the worker's daily employment for the employer for whom he is working?

SUMMARY OF ARGUMENT

These consolidated cases are the fourth in two years in which this Court must determine the meaning of the 1972 amendments (Public Law 92-576) to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA), and the second in which the question is which employees are entitled to LHWCA benefits. Notwithstanding this Court's decision in *Northeast Marine Terminal Co., Inc. et al.* v. *Caputo et al.*, 432 U.S. 249 (1977) the line of demarcation between the federal LHWCA and state workers' compensation laws remains obscure, and that obscurity is the cause of much confusion and litigation.

One factor which has led to the widespread confusion and litigation is the lack of definition of terms which Congress used in the 1972 amendments, in particular "maritime employment." Another factor is the Federal Respondent's unrelenting efforts to attribute to Congress intents which nowhere appear in the legislative history nor are suggested by this Court in *Northeast, supra.* The Federal Respondent's Memorandum to this Court states

that the issue here is whether "maritime employment" includes all physical cargo handling in the waterfront area, but the Federal Respondent actually has applied a much broader interpretation of "maritime employment" which has extended LHWCA benefits to workers not engaged in physical cargo handling, on or off the "situs."

The resultant confusion has become so severe that many insurance carriers are unwilling to underwrite the LHWCA, and when LHWCA insurance is available the costs are becoming prohibitive. Because of all the uncertainties and inequities arising from the 1972 amendments a subcommittee of the House of Representatives of the 95th Congress has held extensive legislative oversight hearings on those amendments. Major revisions to the LHWCA were introduced in the 95th Congress (H.R. 13593 and H.R. 14068) and assuredly will again be introduced in the 96th Congress.

It is the belief of this *amicus curiae* that this Court can clear up some of the confusion by deciding in these cases where the line of demarcation between the coverage of the LHWCA and state workers' compensation law was moved by the Congress in 1972. Although Congress did not define the key terms of the 1972 amendments it did give certain guidelines as to which employees are to be covered by LHWCA benefits, and as to which employees and individuals are *not* to be covered by LHWCA benefits. It is clear from those Congressional statements of intent, both positive and negative, that Congress did not mean to extend LHWCA benefits to Diverson Ford and Will Bryant.

Amicus curiae submits that Congress intended "maritime employment" to include only the physical handling, and checking, of cargoes into and out of vessels on the navigable waters, and the physical handling, and checking, of such cargoes on terminals adjoining the navigable

waters by amphibious employees whose daily activities may require them to work on vessels or in other indisputably longshoring operations on the adjoining terminal area customarily used in vessel loading/unloading. *Amicus curiae* submits that Congress did not intend "maritime employment" to include activities in which the employee is neither required nor permitted to work upon the navigable waters in his daily employment for his employer.

Thus, longshoremen working on the vessel, members of the ship's gang working ashore, and amphibious cargo handlers like Ralph Caputo and Carmelo Blundo in *Northeast, supra* would, if injured, be entitled to LHWCA benefits for all of their daily employments for their employer. As to them the compensation system is uniform. Shoreside employees like Diverson Ford and Will Bryant, whose daily activities neither require nor permit them to go upon the navigable waters nor engage in indisputably longshoring activities would, if injured, be entitled to state workers' compensation benefits for all of their daily employments for their employer. As to them, there will also be a uniform compensation system.

ARGUMENT

The Legislative Purpose of the 1972 Amendments

In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (the LHWCA), 33 USC § 901 *et seq.* by enacting Public Law 92-576, 86 Stat. 1251 *et seq.* on the last day of the second session of the 92nd Congress. These cases[1] are the fourth in which

[1] *Perdue* v. *Jacksonville Shipyards, Inc.*, 539 F.2d 533 (5th Cir. 1976) vacated and remanded in part sub nom. *P. C. Pfeiffer Company, Inc. et al.* v. *Diverson Ford et al.*, 433 U.S. 904 (1977), on remand 575 F.2d 79 (5th Cir. 1978).

this Court has granted a writ of certiorari to determine what Congress did in 1972, and the second in which this Court has had to determine what amended sections 2(3), 2(4) and 3(a) of the LHWCA 33 USC § 902(3), 902(4) and 903(a) really mean. Actually, these cases are the progeny of those presented to this Court in *Northeast Marine Terminal Company, Inc. et al.* v. *Caputo et al.*, 432 U.S. 249 (1972)[2] and concern the meaning of the still undefined term "maritime employment" within the context of the LHWCA.

Workers' compensation laws, of which the LHWCA is one, are in the public interest, and as such they are to be construed liberally so as not to defeat an *obvious legislative purpose* or lessen the scope *plainly intended* to be given, and, if possible, so as to avoid incongruous and harsh results. In construing the statute, words may be read to include all meanings given to them by the courts and meanings within the word as *ordinarily* used, *Jamison* v. *Encarnacion*, 281 U.S. 635, 640 (1930), *Baltimore & P.S.B. Co.* v. *Norton*, 284 U.S. 408, 414 (1933), *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953) and *Northeast, supra*, 432 U.S. at 268. But while workers' compensation laws are to be construed liberally, there are constraints.

The issue here is to whom did Congress in 1972 obviously and plainly intend to extend the benefits of the LHWCA, and to whom did it not so intend. There is no doubt that Congress specifically intended to exclude some employees of maritime employers from the LHWCA benefits, and, therefore, the intentions of Congress as expressed in the legislative history of the 1972 amendments must be carefully examined.

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[2] The other cases are *Director, Office of Workers' Compensation Programs, et al.* v. *Rasmussen et al.*, Nos. 1465, 1481 (amount of death benefits), and *Edmonds* v. *Compagnie Generale Transatlantique*, No. 78-479 (apportionment of third party damages).

The applicable portions of the legislative history of the 1972 amendments indicate that Congress' obvious legislative purpose was to extend LHWCA coverage only to employees part of whose daily activity was then indisputably longshoring, and that it plainly intended not to extend LHWCA coverage to employees, none of whose activities were covered by the Act before 1972, nor to *individuals* whose employers are not engaged in work upon the navigable waters.

Had Congress intended to extend LHWCA coverage to all shoreside workers in a maritime terminal adjoining the navigable waters it could have so provided. But Congress did not so provide. In fact, it expressly disclaimed an intention to extend coverage to *all* workers and all "employees" on the terminal facility. Congress' only intent was to cure the problem of fortuitous changes in coverage in response to suggestions of the Court in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969) and *Victory Carriers* v. *Law*, 404 U.S. 202 (1971).

The Express Purpose or Intent of Congress

The announced purposes or stated intents of the Congress to extend LHWCA coverage shoreward are contained in the Committee Reports of the House of Representatives Committee on Education and Labor No. 92-144, 92d Congress 2d Session, and the Senate Committee on Labor and Public Welfare, No. 92-1125, 92d Congress 2d Session.[3] The two reports are substantially identical[4] and

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[3] 3 U.S. Code Cong. & Admin. News 4698 *et seq.*, 92nd Congress, 2nd Session.

[4] The Senate Report at page 2 contains the following sentence which the House Report does not: "The bill also expands coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." Otherwise, the statute and the reports only use the adjective "adjoining". The words are synonymous, but different. "ADJACENT, ADJOINING, CONTIGUOUS, ABUTTING mean being in close proximity. ADJACENT

each contains a page and a half of explanation entitled "Extension of Coverage to Shoreside Areas" (H. Rept. pgs. 10-11; S. Rept. 12-13). There was no testimony presented to either Committee concerning the extension of LHWCA coverage shoreward, and the legislative history is essentially limited to the two Committee reports.

As to their *specific intentions* the Committees stated:

(1) "The intent of the Committee is to permit a uniform compensation system to apply to *employees who would otherwise be covered by this Act for part of their activity.*" (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).

(2) "The Committee does not intend to cover *employees* who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).

(3) "Likewise the Committee has no intention of extending coverage under the Act to *individuals* who are not employed by a person who is an employer i.e., a person at least some of whose *employees* are engaged, in whole or in part in some form of maritime employment." (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).

Immediately preceding the statement as to its affirmative intention each Committee report stated:

> "It is apparent that if the Federal benefit structure embodied in the Committee bill is enacted, there

may or may not imply contact but always implies absence of anything of the same kind in between; *ADJOINING definitely implies meeting and joining at some point or line;* CONTINGUOUS implies having contact on all or most of one side; ABUTTING suggests having a contact with something else at a boundary or dividing line." Webster's Seventh New Collegiate Dictionary, pg. 11 (Emphasis supplied), G&C Merriam Company, 1970.

> would be a substantial disparity in benefits payable to a permanently disabled *longshoreman*, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the *longshoreman's work* is performed on land than heretofore." (H. Rept. p. 10, S. Rept. p. 13) (Emphasis supplied).

From the above it is clear that the "obvious legislative purpose" or the "scope plainly intended" to be given to shoreward extension of coverage in section 2 of the Act was to extend coverage to longshoremen whose work has moved from the vessel onto the dock because of containerization or other modern cargo-handling techniques, and who without the amendment would be covered by the LHWCA for only part of their daily longshore activities. In short, the so-called "amphibious" worker whose activities would cause him to walk into and out of LHWCA coverage on any one day.

It is equally clear that the activities in which Bryant and Ford were engaged on land were not the result of the advent of modern cargo-handling techniques;[5] that they were not "longshoremen"; and that none of their activities would have been covered by the LHWCA before its amendments in 1972. Congress intended to draw no geographically fixed line of demarcation between federal and state laws, but it did attempt to draw a very definite functional or work activity line, requiring two findings (1) "situs" of the injury and (2) "status" of the employee, *Northeast, supra*, 432 U.S. at 265.

As to *other employees* of the covered *employer* Congress clearly stated that if they were not engaged in loading,

[5] *Northeast, supra*, 432 U.S. at 272.

unloading, repairing or building a vessel they were not to be covered by the LHWCA even if they were injured on areas adjoining the navigable waters customarily used for such activities by covered fellow employees. Congress clearly stated that it did not intend to extend LHWCA benefits to non-longshoremen like Bryant and Ford even if they were injured in an area adjoining the navigable waters since they were not loading or unloading vessels. Thus, Congress contemplated that some employees of a maritime employer would be covered by the LHWCA and that some would not.

Congress also specifically excluded from LHWCA coverage employees of non-maritime employers who, in the course of their own employer's business might be injured in an area adjoining the navigable waters. In the sentence that states Congress' second negative intention the Committees carefully used the term *individual* to describe such workers rather than *employee* used in the first statement of negative intention to plainly indicate that there were two, specific, exclusions to LHWCA coverage. Because the Commission intentionally used *individual* in one negative intention statement as to workers who are not covered by the Act, it is clear that the term *employee* used in explanation of its first stated negative intention refers only to *employees* of a covered employer. Then that sentence would have to be read as:

> "Thus [Ford and Bryant,] employees [of P.C. Pfeiffer Company and Ayres Shipping Company] whose responsibility is only to pick up stored cargo for further transhipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." (H. Rept. pg. 11, S. Rept. pg. 13).

Since the only responsibility of Bryant and Ford was to pick up, put down, or secure cargo for further transhipment Congress expressly intended *not* to extend LHWCA benefits to either of them.

The denial of LHWCA benefits to workers like Ford and Bryant will produce no "harsh and incongrous" result as they will continue, as before 1972, to be entitled to the benefits of state workers' compensation laws for all of their activities. They would be entitled to the same state compensation benefits which are available to maritime workers whose maritime employer is an agency of the United States, or any State or foreign government, or any political subdivision thereof. (33 USC § 903(a)(2), *Bagrowski* v. *American Export Lines, et al.*, 305 F. Supp. 432 (DC, ED Wis 1969), reversed on other grounds, 440 F.2d 502 (7th Cir. 1970).

Had Ford and Bryant been engaged in the activities in which they were injured in nearby Galveston, for example, or in any other port at which terminal operations were conducted by public port authorities or municipal and state agencies they would not, either before or after 1972, be entitled to LHWCA benefits.[6] Thus, the continued denial of LHWCA benefits to Ford and Bryant by Congress in the 1972 amendments works a no more harsh and incongrous result than does Congress' continued withholding of LHWCA benefits to all employees, both maritime and non-maritime, of employers specified in section 3(a)(2).

Shoreside Extension of Coverage

The Federal Respondent states that the unresolved issue after *Northeast, supra,* is whether "maritime employment," for the purposes of the Act, includes all physical

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[6] There are many such operations along the Atlantic and Gulf coasts of the United States. See, "The Stevedore and Marine Terminal Industry of the United States" referred to *Northeast, supra* at footnote 38, 432 U.S. at 276. That survey is also reproduced in the Reply Brief of Petitioner P. C. Pfeiffer Company in the record in the Court below.

cargo handling in the waterfront area, and particularly tasks necessary to transfer cargo between land and water transportation (Memorandum for the Federal Respondent, pgs. 3-4) or in more precise terms, is trans-shipment on land covered by the Act? [7] Congress has already answered the Federal Respondent's question with an unequivocal "No!" Shoreside cargo handling by *individuals* whose employer has no employees working, in whole or in part, upon navigable waters are not covered by the Act, (H. Rept. p. 10, S. Rept. 13). Secondly, "employees" of covered "employers" whose only function is to engage in

[7] Actually the Federal Respondent would go even further. In LHWCA Program Memorandum No. 58 of August 10, 1977 issued immediately after the decision in *Northeast, supra* the Federal Respondent announced "Guidelines for Determination of Coverage of Claims under Amended Longshoremen's Act" pg. 9, i.e. *"The test is essentially quite simple: was the injured worker employed in the waterfront cargo-handling industry in work directly related to the cargo or to the equipment or premises used to handle it? If so, the worker had "employee" status under 2(3)"*. Apparently the Federal Respondent will eventually eliminate navigable waters, maritime employment, vessels, and longshoring operations from the statute unless this Court decisively determines the extent of shoreside coverage. The Federal Respondent attempted to extend coverage to purely clerical workers, but was rebuffed by the Third Circuit in *Maher Terminals, Inc.* v. *Farrell*, 548 F.2d 476 (3rd Cir. 1977). The Benefits Review Board has adopted the Federal Respondent's most expansive views, however, and has extended LHWCA coverage to equipment repairmen on "situs", *Sargent* v. *Matson Terminals Inc.*, 8 BRBS 564 (1978); *Lewis* v. *Pittston Stevedoring Corp.*, 8 BRBS 321 (1978) and *Carroll* v. *Hullinghorst Industries*, 7 BRBS 538 (1978), and even to such workers not even on the "situs", *Texports Stevedore Co.* v. *Winchester*, 6 BRBS 265, 554 F.2d 245 reh. den. 561 F.2d 1213 (5th Cir. 1977) reh. granted 569 F.2d 428 (5th Cir. 1978). *In its "Guidelines" at pg. 11 the Federal Respondent states as to "situs" that "buildings in which stevedoring equipment is maintained and stored may be located outside the fenced boundaries of a terminal, and that "although they do not themselves adjoin the water, they are parts of terminal complexes which do, and are within the Act."* Thus an employee who never works on a vessel nor goes onto an area adjoining navigable waters would be entitled to LHWCA benefits if painting a fork-lift truck which may be used by an employee who is covered by the Act.

cargo trans-shipment, are not covered by the Act (H. Rept. p. 10, S Rept. p. 13). Thirdly, *only* to "employees" of covered employers who are engaged in the immediate transport of cargo between the vessel and a storage or holding area on the pier, wharf, or terminal adjoining navigable waters, or employees part of whose other activities would otherwise be covered by the Act did Congress *expressly extend* LHWCA benefits (H. Rept. p. 10-11, S. Rept. p. 13). The Committees did not discuss car or truck loaders/unloaders, warehousemen, "cotton headers", equipment repairmen and the like because in 1972 *none* of those workers walked into or out of LHWCA coverage. There was no problem in ascertaining which workers' compensation law pertained to their employments. All of their activities, every day, were subject to State law. As to them, the compensation system was already uniform, and the Committees were not concerned about such workers.

It is conceded that neither Ford nor Bryant is, nor was, a longshoreman. It is also conceded that this Court's decision in *Northeast, supra*, does not fully answer the issue presented here. As in *Northeast*, this Court is asked to determine what the Congressionally undefined terms "maritime employment" and "longshoring operations" mean, and what did Congress mean when it used those terms. The NAS believes that the task of the Court is not as "difficult" as it was in *Northeast, supra*, 432 U.S. at 265, unless it attempts to square with the statute the Federal Respondent's use of other terms not mentioned by the Congress, such as "waterfront area", "physical cargo handling", "equipment or premises used to handle cargo". In that event, the difficult task becomes impossible.

The test of coverage, as to the "status" of the injured worker, announced by the Fifth Circuit in these cases prior to this Court's decision in *Northeast, supra*, actually

does not conflict with the decision of the Fourth Circuit in *Conti* v. *Norfolk & Western Ry. Co.*, 566 F.2d 890 (4th Cir. 1977). The Fifth Circuit stated that "The test, rather, was to be whether they were directly involved in the loading or unloading functions," 539 F.2d at 541, footnote 21.[8]

The Fourth Circuit in *Conti, supra,* at 566 F.2d at 895 interpreting this Court's decision as to "status" in *Northeast, supra,* stated:

> "To us the nub of the Court's decision is that an employee who is not engaged in "an integral part of the unloading process" will not fall within the coverage of the Act unless his occupation is of a traditional maritime nature.

In *Northeast, supra,* 432 U.S. at 273 this Court stated:

> "It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen', it had in mind persons whose employment is such that they spend at least some of their time in *indisputably longshoring* operations and who, without the amendments would be covered for only part of their activity." (Emphasis supplied.)

It is clear beyond doubt that before the 1972 amendments neither Ford nor Bryant would have been covered for any part of their activities as rail and truck loaders and unloaders, *Nacirema Operating Company, supra,* and *Victory Carriers, supra.* It is equally clear that rail-

[8] Actually in the course of its lengthy opinion the Court in one sentence stated what it meant to accomplish:

> "Our holding is that an injured worker is a covered 'employee' if at the time of the injury (a) he was performing the work of loading, unloading, building or repairing a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work". 539 F.2d at 539, 540.

car and truck loading/unloading are not indisputably longshoring operations, *Pennsylvania Railroad Co.* v. *O'Rourke,* 344 U.S. 334 (1953), *Noguiera* v. *New York, N.H. and H.R. Co.,* 281 U.S. 128 (1930). *Northeast, supra,* 432 U.S. at 264 unless performed on navigable waters.

Although Congress has not defined or plainly described all the key terms, particularly "maritime employment" and "longshoring operations," some key terms have been agreed upon as to their meaning, such as "stevedore", "stevedore contract", "terminal operator", "longshore gang",[9] "LASH",[10] "container stuffing and stripping" [11] and "point of rest".[12] In addition, six years after the 1972 amendments became law and over a year after this Court's decision in *Northeast,* the Secretary of Labor *still* defines the term "longshoring operations" as:

> "The loading, unloading, moving or handling of cargo, ship's stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States" (20 CFR 1918.3(1)).

Obviously Ford's and Bryant's activities are not included in that definition.

All Lines Move

In some manner this Court must decide where Congress intended to move the line separating LHWCA from state workers' compensation laws, or the Court will continue to be flooded with endless litigation. The NAS submits that the endless litigation will not end if the jurisdictional line for non-amphibians is drawn anywhere other than the "point of rest" which always has and still does clearly define the functional delineation between "longshoring"

[9] *Northeast, supra,* footnote 4, 342 U.S. at 254.

[10] Id. at 273, 274.

[11] Id. at 252, 270, 271.

[12] 46 CFR 533.6(c).

and non-longshoring operations, and that drawing the jurisdictional line of demarkation there does not restrict extension of coverage any more than the Congress intended in 1972. The fact that the Congress did not specify it *in haec verba* does not mean that Congress did not intend its equivalent.

No line, other than perhaps the water's edge, is physically immovable, and that includes the fence, if there be one, around a marine terminal. Like the physical location of the functional point of rest a fence may be moved. It may be moved because the terminal operator desires it, or it can be moved because the terminal owner, the Coast Guard, the Customs Service or some other governmental agency wants it moved. Moreover, drawing a line at the terminal fence may not satisfy the Benefits Review Board or the Federal Respondent, both of whom would extend "situs" beyond the actual terminal to places adjacent thereto, or not adjacent thereto, and so on across the country.[13] Congress clearly did not intend, directly

[13] In the words of one noted commentator: "If two blocks—then why not two miles? Or twenty? Or two hundred? The only limit is said to be the facility's 'use as a maritime enterprise.' Presumably the maritime commerce could be alleged to continue for almost any distance, provided its maritime purpose continued, and did not change into landward delivery and distribution.

This is not to say that the two decisions just cited were wrong. On their facts they are probably right, in that a street or even two blocks hardly seems enough of a physical separation to justify subdividing an obviously integrated waterfront operation. *The purpose here is merely to utter an early warning against becoming embarked upon a progressive geographical expansion in which each widened concentric circle is compared with the last, until the original statutory boundary is irretrievably lost.*

As a matter of statutory construction, the most obvious criticism of the Board's generalization is that it leaves the word 'adjoining' with nothing to contribute. The full clause involved reads: 'other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.' The Board's dictum accurately describes the effect of the phrase beginning 'customarily used.' The word 'use' is the key word in each case, the Board's phrase being

or indirectly that the terminal fence be the line of demarcation.

It is equally clear that Congress did not, knowingly or unknowingly, change the definition of "navigable waters". That term means the same today as it meant in 1972. By amending Section 3(a) Congress meant to extend LHWCA coverage beyond the navigable waters only to employees who may work on them or on specified areas adjacent to the navigable waters in specific employments, i.e., "longshoremen and harborworkers, etc.". Neither did Congress convert truck or railcar unloading/loading on dry land into activities on navigable waters, nor was the terminal made a "navigable water". The terminal remained an "area adjoining such navigable waters",[14] and it obviously cannot be a "navigable water"

'use as a maritime enterprise.' If this is all there is to the rule, why was 'adjoining' hooked on at the beginning, not once but twice? *The answer, once more, is that Congress intended a dual coverage test—one part of which related to function, and one to geography. Congress could have extended coverage to the outer limits of maritime commerce enterprise, or contract, but did not. It drew a physical boundary, beginning with navigable waters as such, and then expanding to 'adjoining' areas, adding, in the case of 'other areas,' the requirement of customary use in named maritime activities.* The word 'adjoining' is a word descriptive of a physical relationship of proximity. It cannot realistically be structured to include some sort of relationship of purpose of function." "The Conflicts Problem Between the Longshoremen's Act and State Workmen's Compensation Acts Under the 1972 Amendments," Arthur Larson, *Houston Law Review*, Vol. 14, Number 2, January 1977 at page 296-7 (Vol. 14: 287) (Emphasis supplied). Professor Larson's feared journey inland has already begun. In *Davis* v. *American President Lines, Ltd.* 7 BRBS 622 (1978), an equipment repairman injured in a facility located approximately 1.5 miles from the employer's main harbor terminal in a building that did not physically abut the main terminal was awarded LHWCA benefits.

[14] House Report pg. 10: "Accordingly the bill would amend the Act to provide coverage of longshoremen—and other employees engaged in maritime employment—if the injury occurred *either* upon the navigable waters of the United *or any adjoining* pier, wharf, dry dock, terminal building way, marine railway, *or other*

and "adjoining such navigable waters" at the same time. So it cannot be said that Ford, Bryant, equipment repairmen, etc., were engaged in activities on the navigable waters.

The Real Unresolved Issue

The real unresolved issue is what does "maritime employment" mean in the context of loading and unloading vessels and within the meaning of sections 2(3) and 2(4) of the Act as amended in 1972. As the Court pointed out in *Northwest, supra*, Congress never defined "maritime employment", but it did give some indication of what it meant those words to mean by the "typical example" of shoreward coverage provided in the Committee Reports.[15] This Court did not define maritime employment either, but held in *Northeast, supra*, 432 U.S. at 273, that unloading of cargo which had been carried by a vessel onto a truck at a "situs" by an *amphibious longshoreman* was maritime employment, and the amphibian in that instance to be covered by the LHWCA.

Attempts to extend LHWCA coverage beyond that amphibian (Caputo) or to those engaged in work which is the equivalent of that formerly performed on the ship (Bundo's container stuffing and stripping) have caused so much chaos and confusion that the insurance industry is either unwilling or unable to provide LHWCA insurance coverage. All affected industries, including those who do not believe Congress even considered them in 1972, took their case to Congress in the 95th Congress.[16] It is clear

area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing or building a vessel". (Emphasis supplied).

[15] S. Rept., at 13; H.R. Rept. at 10-11.

[16] Oversight Hearings on the Longshoremen's and Harbor Workers' Compensation Act, Hearings before the Subcommittee on Compensation, Health and Safety of the Committee on Education and Labor, House of Representatives, Ninety-Fifth Congress, First

from those Oversight Hearings, particularly those held in the Second Session (1978), to be printed in January 1979, that Congress itself did not know how far geographically it intended to extend coverage shoreward, but that it intended to extend coverage only to a limited class of employees—those who before 1972 could walk into and out of coverage during their daily employment.

This Court in *Northeast, supra*, in footnote 34 at 432 U.S. 272 stated that it would be useful if the Benefits Review Board engaged in an "extensive study of the structure of work on the various piers of the country", and that such a study would be helpful for future cases. The Benefits Review Board did not undertake such a study. Prior to the decision in *Northeast, supra*, the Secretary of Labor had a study of Longshore and Harbor Workers' Compensation Program prepared by an OWCP Task Force.[17] Although that report contains a "Glossary of Terms in Longshoreman's and Harbor Workers' Compensation Act (LHWCA)" at Appendix A pgs. 97-102, no definition was advanced for "maritime employment", "longshoreman", or "longshoring operations" Appendix B-1 of the report (pages 103-107) does contain a discussion entitled "Nature and Character of the Longshore Industry", which in general terms describes fairly accurately some of the activities which take place in the piers of the country. To our knowledge, the only current comprehensive study of the structure of work on the various piers of the country is the NAS study to which the Court referred in *Northeast, supra.*

Session, Part 1. Part 2 has not yet been printed. See also. Subcommittee Report at *Congressional Record* pgs. E5959-61 November 9, 1978.

[17] U.S. Dept. of Labor, Office of Workers' Compensation Programs Task Force Report, Longshore and Harbor Workers' Compensation Program (1976).

The NAS submits that much of the chaos and confusion over the intent of Congress has arisen because of the Federal Respondent's unrelenting attempts to make words mean things different than actual practice has long recognized them to mean. The "essentially quite simple" test promulgated by the Federal Respondent in LHWCA Program Memorandum No. 58 [18] is a prime example of those attempts in that "status" is extended to employees engaged in *work directly related to the cargo or the equipment or premises used to handle it.* That test would include the janitor who cleaned up after a mechanic who was working on a piece of equipment, perhaps even a piece of rope, which might at some time be used by someone directly in the process of loading a vessel. That same piece of equipment, however, might not be so used. The chaos, confusion and endless litigation that will come from the "essentially simple test" is too

[18] In a prepared statement before the House subcommittee on Compensation, Health and Safety on May 22, 1978 during its oversight hearings on the LHWCA, the Assistant Secretary of Labor for Employment Standards, to whom the Federal Respondent reports stated: "We have also carried out other recommendations of the OWCP Task Force, mentioned earlier. On August 10, 1977 we issued Program Memorandum No. 58. It was drafted as an internal document in response to a recommendation by the Task Force that OWCP issue general guidelines on issues of coverage to the district offices for the sake of consistency of administration of the Longshore Act program. Basically, Program Memorandum No. 58 represents a synthesis of all Longshore coverage decisions, including the decisions of the U.S. Supreme Court in *Northeast Marine Terminal Co.* v. *Caputo* (432 U.S. 249), and its progeny, as well as decisions of the U.S. Courts of Appeals and the Department's Benefits Review Board. The *Caputo* case is a milestone since it is the only Longshore jurisdiction case to be decided by the U.S. Supreme Court following the 1972 amendments. Let me emphasize that the Memorandum's purpose was not to extend jurisdiction but to serve as a field guide for uniform nationwide administration of the Act in light of the most recent judicial interpretations of our jurisdiction." Nothing in *Northeast, supra,* suggests the "essentially simple" test of Program Memorandum No. 58, see *supra* at page 12, footnote 7.

enormous to comprehend, and a Court case involving the question of whether a mechanic putting anti-freeze in the stevedore company president's car on a pier is engaged in "maritime employment" because the president's employment is "maritime" is not beyond the realm of possibility.

The uncertainty, caused in large measure by Congress' failure to define terms and the Federal Respondent's attempts to attribute to Congress intentions Congress clearly denied, has had, and continues to have, devastating effects on the employers who must litigate each new situation or pay extraordinarily high compensation benefits or insurance premiums, if insurance is available.[19] If words are given their plain meaning, and vessel "loading and unloading" is not translated into painting a forklift truck, splicing a rope, loading a truck, or securing a piece of cargo on a rail car, the chaotic situation that confronts the Courts and the industry will be ameliorated, and there will be a uniform compensation system. Those workers engaged in indisputably longshoring operations would be entitled to LHWCA benefits. If those who are so engaged may also on the same day perform other tasks on the "situs" they would, like Caputo, be entitled to LHWCA benefits all day. All others, like Bryant and Ford, who are not so employed would be uniformly all day entitled to state workers' compensation law benefits. As to each class of worker (1) the longshoreman of a ship gang, on land or water; (2) the longshoreman amphibian who also works on vessels and land the same day, and (3) those who never do (1) or (2), each would have a uniform compensation system as intended by Congress. None would walk into or out of coverage on any one day. Each would know to which compensation

[19] In Houston, for example, a major employer testified in 1977 that between 1972 and 1977 his LHWCA premiums increased more than 180%, and his premium cost per man hour from 81 cents to 2.28. House Hearings, *supra,* pgs. 306-7; Id. at 462-483.

system he is entitled if he is injured. Likewise, the employer, the insurance carrier, the Courts and, hopefully, the Federal Respondent would know. No harsh or incongrous result would attach to such an interpretation of section 2(3) and 2(4) of the Act. Recent history indicates that any other interpretation causes chaos, confusion and endless litigation. Clearly, if there is anything sure, Congress did not intend chaos and confusion.

An Unexpected Result of the Uncertainty—Loss of Job Opportunities

The high cost of LHWCA compensation, either benefits or insurance premiums, caused in part by the obscurity of the jurisdictional line between federal and state compensation law, has had devastating effects on the commerce of the United States and longshore dock labor as well as the employers. Those costs have contributed to the diversion of the United States cargoes away from this country's ports to readily available and lower cost ports in neighboring Canada. That diversion has reduced the income of the U.S. cargo handling industry, and has contributed to the constant reduction in work available for U.S. longshoremen.

For example, the Canadian ports of Montreal, Quebec, St. John, New Brunswick, and Halifax, Nova Scotia are in direct competition with U.S. ports on the Great Lakes and the North Atlantic for the handling of U.S. origin and destination cargoes carried by ships. According to a recent report by the U.S. Department of Commerce [20] for the period of 1974-1976 some 1,644,461 tons of U.S. origin cargo valued at $1,391,511,479 was exported from the United States via land transportation (truck and

[20] *U.S. Exports Transhipped Via Canadian Ports*, U.S. Department of Commerce, Maritime Administration, January 1978.

rail) and loaded onto vessels at Canadian ports. Another report of the U.S. Department of Commerce indicates that because of the diversion U.S. port industries lost some $90,445,335 in direct and indirect revenue. That is only as to exports! [21]

Other data reported by the U.S. Department of Commerce in U.S. Merchant Marine Data Sheets, Maritime Administration, discloses that from June 1, 1975 to September 1, 1978 the number of longshoremen, clerks, checkers and allied crafts available to work each day dropped from 64,000 to 56,773 [22]—an annual reduction of 15,032,160 man-hours. Admittedly, there may be other contributing factors to the loss of U.S. cargoes to neighboring Canada and the substantial reduction in U.S. dock labor work, but the high cost of LHWCA which U.S. employers must pay is a significant factor. For example, the manual rate established by the New York State Rating Board for general stevedoring is now over $68 per $100 of payroll. In Halifax, Nova Scotia the equivalent rate established by the Province of Nova Scotia is $2.25 per $100 of payroll, and in St. John, New Brunswick $3.50. The U.S. and Canadian wage scales are almost identical.[23] The over $60 per $100 of payroll cost advantage can only enhance the competitive position of Canadian port interests vis-a-vis their U.S. competitors.

The resultant compensation cost-lost work spiral becomes readily apparent. As LHWCA coverage is extended to more and more workers and the jurisdictional

[21] *Economic Impacts of the U.S. Port Industry: An In-Put Out-Put Analysis of Water Borne Transportation*, U.S. Department of Commerce, Maritime Administration (1978).

[22] On November 1, 1978, the Maritime Administration reported the estimated average employment as of October 1, 1978 for longshoremen, clerks and allied crafts to be 49,395 for all four seacoasts.

[23] *House LHWCA Oversight Hearings, supra*, at page 531.

line remains obscure, the cost of compensation rises in an unpredictable manner. The added costs must be passed on to the ultimate consumer—the U.S. shipping public. The cost disparity to the shipper between a U.S. and a Canadian routing increases, and the shipper elects to route more of his cargo via Canadian ports. U.S. port revenues and man-hours decline. History tells us that as man-hours decline, compensation claims and costs increase, and so the process repeats itself.

Alternatively, American industry may turn to other avenues of relief from the high costs of the LHWCA. Non-maritime employers could undertake the stuffing and stripping of containers at locations outside the "situs" of the LHWCA. Carmelo Blundo would be unemployed. Consignees of cargo or truckers might begin to perform their own truck loading/unloading. Ralph Caputo and Will Bryant would be unemployed. The railroads might again do their own lashing or securing of cargoes on rail cars. Diverson Ford would be unemployed. Publicly-owned marine terminals could accelerate the use of state or municipal employees to perform all terminal operations or, as has already happened, go into the business of loading and unloading vessels at publicly-owned marine terminal facilities.

A Line Must Be Definitively Stated

As this Court stated in *Northeast, supra*, in 1972, Congress moved the line separating LHWCA coverage and the coverage of state workers' compensation laws, but except for persons like Ralph Caputo and Carmelo Bundo the location of that line remains obscure. In the absence of Congressional definition of key terms and no clear definition of the jurisdictional line of demarcation the Federal Respondent has fashioned an all inclusive and unreasonable "essentially simple test" and the Benefits Review Board has extended "covered

situs" to areas not adjoining the navigable waters. In the words of Professor Larson:[24]

> "It would be difficult to imagine a situation presenting a more urgent need for an early Supreme Court resolution, with perhaps tens of thousands of workers inhabiting a shadow land in which the range of possible benefits may vary so much as three or four hundred percent."

The line must be drawn, however, in such a manner that it is in furtherance of an obvious legislative purpose and will not lessen the scope plainly intended by Congress. The difficulties to be encountered if something like the Federal Respondent's "essentially simple test" is adopted are accurately described by Messrs. Gilmore and Black,[25] i.e.,

> "The almost infinite range of conditions of the waterfront has been detailed in thousands of cases. The line between direct, indirect, physical 'participation' and direct, indirect non-physical 'partiction' will be not a wit easier to draw than the line between Jensen and 'maritime but local' in the years before 1972."

Those authors agree with Professor Larson and the NAS that:[26]

> "Not only has the LHWCA gone ashore but, or so the legislative history suggests, only some types of workers injured within the new territorial limits of LHWCA are meant to be covered. If that is so, we are threatened with a spate of LHWCA litigation which will be at least as depressing as the 1927-1942 'local but maritime' litigation which preceeded the invention of the twilight zone."

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[24] Op. cit. at pg. 322.

[25] *The Law of Admiralty*, Second Edition, Grant Gilmore, Charles L. Black, Jr., The Foundation Pres., Inc. 1975 at pg. 430.

[26] Op. cit. pg. 428.

The stevedoring industry, and indeed all other employers and the few remaining insurance carriers subject to the LHWCA, cannot wait another 45 years while the courts try "to ascertain the respective spheres of coverage of state and federal systems," *Northeast, supra,* 432 U.S. at 259. Testimony presented to the subcommittee on Compensation, Health, and Safety of the House of Representatives Committee on Education and Labor during the LHWCA oversight hearings in the 95th session of Congress [27] clearly indicates that the extent of uncertainty and unpredictability of the LHWCA have caused such economic devastation that the insurance industry is unable or unwilling to provide the necessary insurance, and when it does provide the insurance many employers cannot afford to pay for it.

The jurisdictional line must be drawn now. It must be clear and unmistakable, and we submit, compatible with existing practices and labor-management contracts.

In these cases the practices are not questioned, and the pertinent labor-management agreements clearly separate maritime from non-maritime employment. The NAS believes that "point of rest", even though rejected by this Court as to Blundo and Caputo in *Northeast, supra,* comes the closest to meeting what Congress intended and is the most understood line of demarcation between the state and federal spheres. The NAS recognizes that there may be a few Ralph Caputos whose daily employment requires them to cross over that line and that as to them, perhaps they should be eligible for LHWCA benefits if injured on such days. On the other hand, there are many, many more employees on the country's piers like Bryant and Ford who never cross the "point of rest" in their daily employments, and they should not be entitled to LHWCA benefits.

[27] Subcommittee activities Report reproduced as Appendix B to this brief.

The point to be made is that there is no twilight zone or questionable area of coverage if the line of demarcation is clearly drawn at some place like the "point of rest" where maritime and non-maritime employments meet, but do not overlap. For example, in the case of Diverson Ford, he was not engaged in the last step of maritime employment. He was actually engaged in the second step of inland transportation. *First* the vehicles had to be placed on the railroad cars. They were placed there solely for inland movement. They could have been driven out of the terminal under their own power. The *second* step, that in which Ford was engaged, was to secure the vehicles to the railroad cars so they wouldn't fall off or move in transit overland. Nothing Ford was doing was related to vessel loading/unloading either directly or indirectly.

Will Bryant, on the other hand, was engaged in the last step of carriage by motor carrier in inland transportation. He was taking cotton off a truck, completing the obligation of the motor carrier to deliver the cotton. His activities were directly related to motor carriage on land, and were not directly or indirectly related to vessel loading/unloading.

Defining the line of demarcation as urged by the NAS would terminate a substantial amount, if not all, of the litigation over what Congress intended in 1972 in a manner consistent with Congress' express intentions, both negative and positive, and with existing industry practices and labor-management agreements. Additionally, it would remove a major cause of the uncertainty which has so adversely affected the insurance industry, the employers and employees subject to the Act.

Conclusion

The tests for coverage stated by the Fourth and Fifth Circuits are essentially correct, but the Fifth Circuit, it is submitted, misapplied its own test as to Bryant and Ford. Neither Bryant nor Ford was (a) performing the work of loading, unloading, building or repairing a vessel nor (b) directly involved in such work. Ford was directly involved in activities directly related *only* to inland rail transportation, and Bryant was directly engaged in activities solely related to motor carriage. Denying them LHWCA benefits will work no harsh and incongruous result. On the contrary, denial of LHWCA benefits to them would resolve a substantial problem which has caused chaos, confusion, and much litigation, and would permit the uniform compensation system so ardently sought by the Congress. For all of these reasons, the decision of the Fifth Circuit should be reversed.

Respectfully submitted,

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Appendices

APPENDICES

November 9, 1978

CONGRESSIONAL RECORD

Extensions of Remarks

E5959

E5961

ACTIVITIES OF THE SUBCOMMITTEE ON COMPENSATION, HEALTH AND SAFETY FOR THE 95TH CONGRESS

HON. JOSEPH M. GAYDOS

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Saturday, October 14, 1978

• Mr. GAYDOS. Mr. Speaker, the subcommittee on Compensation, Health and Safety, on which I am pleased to serve as chairman, conducted extensive legislative and oversight hearings during the 95th Congress on the various matters subject to its jurisdiction.

The subcommittee jurisdiction encompasses the following public laws:

Occupational Safety and Health Act of 1970 (Public Law 91-596);

Federal Mine Safety and Health Act of 1977 (Public Law 95-164);

Federal Employees' Compensation Act (Public Law 93-416); and

Longshoremen's and Harbor Workers' Compensation Act (Public Law 92-576).

The subcommittee, during 1977 and 1978, held 43 days of oversight hearings on the following laws within its jurisdiction:

First. Occupational Safety and Health Act of 1970—14 days;

Second. Longshoremen's and Harbor Workers' Compensation Act—17 days; and

Third. Federal Employees' Compensation Act—12 days.

Additionally, the subcommittee held 13 days of legislative hearings on the following bills within the subcommittee's jurisdiction:

First. H.R. 4287, Federal Mine Safety and Health Amendments Act of 1977—6 days;

Second. H.R. 4286, Youth Camp Safety Act—5 days; and

Third. H.R. 13461, Asbestos Related Disease Screening Act of 1978—2 days.

LEGISLATIVE ACTIVITIES [28]

C. The Longshoremen's and Harbor Workers' Compensation Act

The subcommittee conducted field hearings at San Francisco, Calif., on June 24-25, 1977, and 15 additional hearings at Washington, D.C.

[28] Part A pertaining to Mine Safety and Health and Part B pertaining to the Federal Employees Compensation Act omitted as not relevant.

Witnesses testifying before the subcommittee included Members of Congress, and representatives of the recreational boating industry, stevedore organizations, shipbuilders, the insurance industry, State insurance departments, labor organizations, the offshore drilling contractors, the Offshore Marine Services Association, the Associated General Contractors, the Office of Workers' Compensation Programs of the Department of Labor.

The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1972. In addition to upgrading certain of the benefit provisions of the act, the jurisdiction of the act was extended from "navigable waters" to "adjoining areas."

Industry witnesses submitted the following criticisms:

First. Jurisdiction: It is alleged that the extension to "adjoining" areas leaves vague and unclear just what operations on land are covered. The small recreational boatyards, in particular, are in a state of uncertainty as to the status of their employees working at locations which are not geographically adjacent to navigable waters. The small boat and barge builders expressed concern about their employees who may be involved in nonmaritime construction during extensive periods of the year.

Second. Unrelated death benefits: The law provides that if a claimant receives compensation benefits for either permanent partial or permanent total disability and dies from any cause, his widow and/or survivors would be entitled to certain benefits. It is contended this has the effect of adding a life insurance policy to a workers' compensation law.

Third. Annual escalation of benefits: It has been contended that the unpredictability of future, annual escalation of benefits makes insurance premium assessment equally unpredictable, resulting in higher insurance costs.

Fourth. No limitation on weekly benefits to widows and/or survivors in case of death: Since there is a maximum payable for total permanent disability, it is alleged that, in certain instances, a widow could receive higher benefits from the death of the employee than if he was receiving total permanent disability benefits.

Fifth. Procedure for establishing loss of wage-earning capacity: It has been stated that in some cases a claimant receives compensation in excess of his take-home wages prior to injury.

Sixth. Employers' access to an independent physical examination: It has been alleged that in certain district offices, the deputy commissioners are unwilling to order an independent medical examination at the request of an employer.

Seventh. Settlements: It has been alleged that the administrative law judges have no authority to approve settlements, which results in excessive litigation.

Assistant Secretary Elisburg testified as to the administrative problems in implementing the act, but stated he intends to substantially upgrade the administration of the act. Additionally, he informed the subcommittee that the Labor Department has authorized a study to conduct an indepth study of insurance rates and availability under the act.

I would like to take this opportunity to thank Members of Congress and others who have appeared as witnesses before the Subcommittee on Compensation, Health and Safety, and I would particularly like to thank members of the subcommittee who have been so cooperative throughout the 95th Congress. •